

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YING JACKSON,

Appellant,

vs.

IS S. NELSON, Warden,
Quentin State Prison,

Appellee.

MAR 10 1969

No. 22,402

PETITION FOR REHEARING

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

MICHAEL J. KELLY
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3254

Attorneys for Appellee

FILED

DEC 26 1968

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IRVING JACKSON,

Appellant,

vs.

LOUIS S. NELSON, Warden,
San Quentin State Prison,

Appellee.

No. 22,402

PETITION FOR REHEARING

TO THE HONORABLE STANLEY N. BARNES, GILBERT H. JERTBERG,
AND WALTER ELY, CIRCUIT JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT:

COMES NOW, LOUIS S. NELSON, Warden, San Quentin
State Prison, and pursuant to Rule 40 of the Rules for
Appellate Procedure, Title 28, United States Code,
respectfully requests a rehearing of this Court's decision
of December 12, 1968, in the above-entitled proceeding,
which was to review an order of the United States District
Court for the Northern District of California.

As grounds for rehearing, appellee respectfully
represents:

That this honorable Court has overlooked appellant's
deliberate bypass of his right to appeal from the judgment of
conviction as guaranteed by the State of California. Such a
deliberate bypass of adequate state procedures under which a
claimed violation of federal constitutional rights could have
been raised should preclude appellant from raising his

allegation of constitutional error in federal habeas corpus.
Fay v. Noia, 372 U.S. 391 (1963); Henry v. Mississippi, 379
U.S. 443 (1965); Nelson v. California, 346 F.2d 73 (9th Cir.
1965); Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965);
Lessard v. Dickson, 394 F.2d 88 (9th Cir. 1968).

There can be no question that appellant was aware
of his right to appeal and chose not to avail himself of that
right. In his petition to the District Court he stated that
he did not appeal because his co-defendant had filed an appeal.

Appellee therefore submits that appellant's deliber-
ate bypass constitutes an adequate independent basis for
affirming the order of the District Court dismissing the
petition.

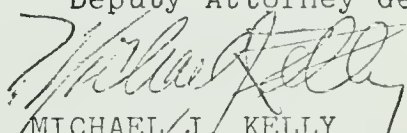
CONCLUSION

For the above reasons, we respectfully urge this
Court to grant a rehearing and to affirm the order of the
District Court.

DATED: December 26, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General


MICHAEL J. KELLY
Deputy Attorney General

Attorneys for Appellee

